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No. 265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

OLIVER H. SWICK,

Petitioner,

—VS.—

THE GLENN L. MARTIN COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

JACOB W. FRIEDMAN,
Attorney for Petitioner.

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—against—

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Oliver H. Swick respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, to review a determination of that Court, rendered on March 31, 1947, affirming a judgment of the United States District Court for the District of Maryland (R. 26),* which judgment was entered for the respondent on the grounds that petitioner's cause of action was barred by the Maryland statute of limitations (R. 20). The time for filing the present petition for certiorari has been extended by the Chief Justice to and including August 29, 1947 (R. 30).

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* Numbers in parentheses refer to pages of Transcript of Record.

Statement of Matters Involved

This action was brought by petitioner in the United States District Court for the District of Maryland to recover from the respondent unpaid minimum wages and overtime compensation together with an additional equal amount as liquidated damages plus attorney's fees and costs, pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201).

Petitioner's complaint filed June 25, 1946, alleged that he was subject to the provisions of the Act, and sought to recover for overtime pay for a period of time between March 5, 1941, and June 14, 1942. Respondent's answer, inter alia, set up the defense of statute of limitations, relying upon Chapter 518, Laws of Maryland, June 1, 1945 (hereinafter referred to as Chapter 518), which would bar all claims arising under the Fair Labor Standards Act accruing more than two years before its enactment and sued on after June 1, 1946.

Thereafter a motion was made by the respondent for judgment on the pleadings, and, in the alternative, for summary judgment, on the grounds that it conclusively appeared on the face of the complaint that the cause of action was barred by the Maryland statute of limitations. A cross-motion was made by petitioner to strike out that part of the respondent's answer which set up the affirmative defense of statute of limitations, on the grounds that Chapter 518 was unconstitutional, in that it discriminated against claims arising under Federal laws in violation of Article VI, and denied equal protection of the law as provided by the Fourteenth Amendment of the Constitution of the United States.

These motions came on to be heard before Judge William C. Coleman of the District Court of the United States for

the District of Maryland, and on October 28, 1946, that Court directed that judgment be entered for respondent (R. 1), after rendering an opinion, sustaining the constitutionality of the Maryland statute (R. 2-15).

Petitioner duly appealed to the United States Circuit Court of Appeals for the Fourth Circuit, and the judgment appealed from was affirmed on March 31, 1947 (R. 23).

Question Presented

Whether Chapter 518, Laws of Maryland, 1945, which provides that all claims under the Fair Labor Standards Act shall be brought within three years from the time they accrue, violates the Constitution of the United States.

Reason for Allowance of Writ

Prior to the enactment of Chapter 518 by the Maryland legislature, it had been held by the courts of Maryland and by the Federal District Court that the Fair Labor Standards Act created a cause of action on a specialty and hence was subject to Maryland's twelve-year statute of limitations, as provided by Article 57, Section 3, of the Maryland Code. The Maryland legislature, without disturbing Article 57, Section 3, singled out the Fair Labor Standards Act for specific and special limitation, and denied to those claiming under the Fair Labor Standards Act the benefit of a twelve-year statute of limitations which accrued to all other citizens of the State of Maryland bringing actions interpreted by the courts of that state to be actions on specialties.

In the light of the decisions of this Court, and the holdings of other courts, in similar situations, it would appear that the Maryland legislature by the enactment of Chapter 518 did in effect discriminate against a federal law, and deny to some of its citizens the equal protection of the law,

in clear violation of Article VI and the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the record of all proceedings of said Circuit Court of Appeals for the Fourth Circuit, had in this cause, to the end that this cause may be reviewed and determined by this Court; that the determination of the Circuit Court of Appeals for the Fourth Circuit be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated, New York, N. Y., August 4, 1947.

JACOB W. FRIEDMAN,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Petitioner,

OLIVER H. SWICK,

—against—

THE GLENN L. MARTIN COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below

Coleman, *D. J.*, rendered an opinion on behalf of the United States District Court for the District of Maryland wherein the constitutionality of Chapter 518, Laws of Maryland, 1945, was sustained (R. 2-15). The judgment of the District Court was affirmed in an opinion written by Soper, *Circ. J.*, of the Circuit Court of Appeals for the Fourth Circuit (R. 18-23).

Jurisdiction

The determination of the Circuit Court of Appeals for the Fourth Circuit now sought to be reviewed was rendered on March 31, 1947 (R. 23), and the time to apply for certiorari was extended by the Chief Justice to and including August 29, 1947 (R. 26).

The jurisdiction of the Supreme Court of the United States is invoked under Section 240 of the Judicial Code as amended, otherwise known as 28 U. S. C., Section 347, subdivision (a).

Statutes Involved

The subject section of the Maryland Code is Chapter 518 of the Laws of the General Assembly of Maryland of 1945, Article 59, Section 19, which reads as follows:

"An act to add a new section to Article 57 of the Annotated Code of Maryland (1939 Edition), title 'Limitation of Actions', said new section to be known as Section 19 and to follow immediately after Section 18 of said Article, prescribing a period of limitations within which actions for the recovery of wages, overtime compensation, fees and/or penalties may be brought under the Fair Labor Standards Act of 1938, as amended.

Section 1. Be it enacted by the General Assembly of Maryland, that a new section be and it is hereby added to Article 57 of the Annotated Code of Maryland (1939 Edition), title 'Limitations of Actions', said new section to be known as Section 19, to follow immediately after Section 18 of said Article and to read as follows:

19. All actions brought by or on behalf of any employee or employees for the recovery of unpaid minimum wages, unpaid overtime compensation, fees and/or penalties, as the case may be, under the Fair Labor Standards Act of 1938, as amended, shall be brought within three years from the time such cause or causes of action accrued, unless such Fair Labor Standards Act shall prescribe a different period within which such action or actions may be brought; provided, however, that all such substituting causes of action which accrued more than two years before June 1, 1945, shall be sued on within one year after June 1, 1945, unless

such Fair Labor Standards Act shall provide a different period within which such causes of action may be sued on.

Section 2. And be it further enacted, that this Act shall take effect June 1, 1945.

Approved April 5, 1945."

Statement of the Case

A summary statement of the case and of the argument is set forth in the petition.

Specification of Error to Be Urged

The error to be urged is identical with the reason for the allowance of writ as set forth in the foregoing petition.

ARGUMENT

The Maryland Statute of Limitations, to wit, Chapter 518, Laws of Maryland, June 1, 1945, is unconstitutional in that it discriminates against claims arising under Federal laws in violation of Article VI, and denies equal protection of the law as provided for by the Fourteenth Amendment of the Constitution of the United States.

A. ***Discrimination against claims arising under the Federal Law.***

The petitioner's argument that Chapter 518 is unconstitutional on the ground that it violates Article VI of the Constitution, in that it discriminates against rights arising under Federal laws, is accurately stated by Coleman, *D. J.*, of the Federal District Court in his opinion

which he wrote in support of the decision granting respondent's motion for judgment on the pleadings:

> "Plaintiff's argument is based on the theory that under the existing law of Maryland, any right of action which the plaintiff has under the Fair Labor Standards Act exercisable in Maryland, is a right upon a specialty; and that since as respects such rights the Maryland statute provides a limitation of twelve years, to provide a shorter period for rights accruing under the Fair Labor Standards Act is a discrimination forbidden by the provision of Article VI of the Constitution, just quoted" (R. 7).
>
> "It is this singling out of this particular Federal Statute by the Maryland Legislature which the plaintiff claims amounts to a forbidden discrimination" (R. 6).

There is no dispute that prior to the enactment of Chapter 518 it had been held by the Courts of Maryland and the District Court of the United States for the District of Maryland that actions brought under the Fair Labor Standards Act were rights on specialties and subject to the Maryland twelve-year statute of limitations. Judge Soper concedes this in his opinion where he says:

> "The question, however, was considered prior to the passage of the Maryland Act of 1945 by the Baltimore City Court on March 15, 1943 in Manhoff v. Thomsen-Ellis-Hutton Co., 6 Labor Cases 61,498, and by the District Court of the United States for the District of Maryland on August 14, 1944 in Bright v. Hobbs, 56 F. Supp. 723. Both courts held that suits in Maryland under the Fair Labor Standards Act were then

covered by the twelve year statute of limitations, and both based their opinions on broad statements in decisions of the Court of Appeals to the effect that in cases where liability is created by the positive requisitions of a statute and not by the act of the parties themselves, the liability is founded upon a record of the highest sort and is in the nature of a specialty and is therefore subject to the period of limitations provided for obligations of that kind" (R. 20).

Judge Coleman in his District Court opinion (2-15) leaves no room for argument in this point. Citing *Manhoff* v. *Thomsen-Ellis-Hutton Co.*, Maryland City Court, Baltimore City, March 15, 1943, 6 Labor Cases, 61,498, and referring to his opinion in *Bright* v. *Hobbs*, 56 F. Supp. 723, he stated:

> "We rested our decision squarely upon which we believed to be the *inescapable interpretation* of the decision of the Maryland Court of Appeals in Taggart Ins. Comm. v. Wachter, Hoskins & Russell, Inc., 179 Md. 608, which, very briefly summarized insofar as it relates to the point here at issue, is to the effect that where a statute creates a new or increased obligation, as opposed to a restriction of an obligation, the twelve-year and not the three-year statutory provision applies" (R. 5). (Italics ours.)

The respondent in its brief to the Circuit Court of Appeals made a lengthy issue of the fact that the Maryland Court of Appeals had never been called upon to decide whether suits brought under the Fair Labor Standards Act were actions on specialties subject to the twelve-year

period of limitations prescribed or actions governed by Section 1 of Article 57 of the Maryland Code which prescribes a three-year period of limitations. A long historical analysis was made by respondent in an attempt to prove the unsoundness of the decisions declaring the Fair Labor Standards Act to be subject to the twelve-year statute. The reason for this argument was obvious, for if it were to be held that the Fair Labor Standards Act was subject to a three year statute of limitations, then the Maryland Legislature by enacting Chapter 518 did in effect create a statute declaratory of the existing law. If such was the situation, no claim of discrimination could arise.

Although both opinions in the courts below were devoted in the major part to a discussion of this point, neither passed directly upon it, Judge Soper saying, "But we need not decide that question" (R. 23), and Judge Coleman saying:

> "The Maryland Court of Appeals, as we have just pointed out, has never actually decided that a suit under the Fair Labor Standards Act is a suit on a specialty, but even if it had done so, the Maryland Legislature could vitiate such a decision" (R. 7).

The *Manhoff* case (*supra*) was not appealed and in the absence of any higher court's decision to the contrary, its determination that actions under the Fair Labor Standards Act were actions upon a specialty, and as such governed by the twelve-year statute of limitations, became the law of the State of Maryland, and the fact that the Maryland Court of Appeals did not itself directly decide the question, did not make it any less the law of the State.

It may well be pointed out here that even if the Maryland Court of Appeals had not presented by its *Taggart* deci-

sion an "inescapable interpretation" that the Fair Labor Standards Act created a right upon a specialty, the fact that a Maryland Court had already ruled upon the question left the Federal Courts below without any alternative but to follow that ruling. *Erie Railroad Co.* v. *Tompkins,* 302 U. S. 671.

How then did the courts below sustain the Maryland Legislature's action in enacting Chapter 518? The Circuit Court of Appeals' opinion, although it labors long on a question it finally decided not to answer, reaches its conclusion in several sentences:

> "We base our decision on the Act of 1945 since we have no doubt as to its constitutionality. *It cannot be denied* that suits like the present are of the same character as suits upon simple contracts of employment outside the scope of the Fair Labor Standards Act; and it was clearly within the power of the Maryland legislature to view the situation realistically and to amend the historic rule as to statutory specialties *so as to exclude therefrom suits based on obligations imposed by the federal statute* and to place them in the category better suited to their intrinsic nature" (R. 23). (Italics ours.)

The District Court declared that even though a right of action under the Fair Labor Standards Act was a right upon a specialty, "The Maryland Legislature could vitiate such a decision" (R. 7), and as a matter of fact did:

> "That is, it has seen fit to declare in effect, that hereafter suits brought in this State under the Fair Labor Standards Act are not to have the same period of limitations as suits on specialties but shall have no shorter period than is permitted with respect to suits

> on kindred causes of action at common law by an employee against his employer for wages, which is three years, or by Maryland statute, as, for example, under the Maryland Workmen's Compensation Act where the period of limitations is only one year. Maryland Code, 1939, Article 101, Section 51" (R. 7-8).

Although Judge Soper says that "it cannot be denied," we do vigorously deny that the obligations imposed by the Fair Labor Standards Act are of the same character as suits upon simple contracts of employment outside the Federal statute. Judge Coleman himself, in his opinion, had to admit the difference when he said: "* * * it is true there is no Maryland statute giving a right of action which is the same as that given by the Fair Labor Standards Act, and also, *no such liability at common law*" (R. 8). (Italics ours.) The obligations imposed by the Fair Labor Standards Act are purely statutory, and provide for rights not to be found any place in the common law. As a matter of fact, the Fair Labor Standards Act will nullify any simple or complex contract of employment, the terms of which are opposed to the spirit and letter of the statute. A minimum wage is imposed, an overtime wage is prescribed, and penalties and attorneys' fees are provided for. The rights accruing under the Fair Labor Standards Act being born then of a special and distinctive statute, are protected and provided for by the Maryland law as specialties, and it is in this category of specialties that actions under the Federal statute find alliance with kindred causes of action.

The Maryland Legislature, by enacting Chapter 518 with the sanction and blessing of the learned courts below, did in effect declare that actions under the Fair Labor Stand-

ards Act are no longer actions upon a specialty, but actions for wages.

This is the discrimination complained of by the petitioner and denounced as unconstitutional by the same Circuit Court of Appeals in *Rocton & Rion R. R.* v. *Davis,* 159 F. (2d) 29, which Judge Soper invites us to compare with the case at bar (R. 23). In that case the court had said:

> "We think, too, that this statute is invalid. The statute is directed solely at claims 'relating to wages claimed under a Federal statute.' It is a fair inference that the statute was purposively aimed at the Fair Labor Standards Act. *The law seems well settled that a statute of limitations of a state is unconstitutional when the statute is directed exclusively at claims arising under a Federal law.* And particularly is this true when the state statute of limitations is discriminatory in its effect in favor of state claims and against Federal claims for the ordinary wage claims arising in South Carolina would not be barred in less than six years under the South Carolina statute of limitations. Republic Pictures Corporation v. Kappler, 327 U. S. 757, 66 S. Ct. 958, affirming 151 F. (2d) 543; Miles v. Illinois Central Railway Co., 315 U. S. 698; McKnett v. St. Louis & San Francisco Railway Co., 292 U. S. 230, 234; Campbell v. Haverhill, 155 U. S. 610. And see, E. H. Clarke Lumber Co. v. Kurth, 152 F. (2d) 914; Fullerton v. Lamb, 163 Pac. (2d) 941. *Cf. Swick* v. *Glenn L. Martin Co.* (U. S. D. C. Md.), decided *Oct. 23, 1946.*" (Italics ours.)

It should be borne in mind that in the *Republic Pictures* case (*supra*), as in all other cases on the subject, it had not been judicially determined by the courts of the par-

ticular state in what category actions arising under the Fair Labor Standards Act properly belonged. The Federal Courts in the first instance were compelled to decide this question, and they did so by placing the federal statute within the most nearly comparable statute of limitations of the state involved. In the case at bar, however, the federal courts were not forced to undertake that chore. The law of the State of Maryland was crystal clear. Actions arising under the Fair Labor Standards Act were rights on specialties governed by a twelve-year statute. The only question that confronted the courts below was whether the Maryland Legislature, by deliberately singling out a federal statute and providing a shorter period of limitations for its enforcement than was its inherent and heretofore judicially defined prescription, acted with the discrimination forbidden by the Constitution of the United States. We submit that the Circuit Court of Appeals below usurped the authority of the Maryland courts when it took upon itself to determine what category of limitations was better suited to the *intrinsic nature* of suits arising under the Fair Labor Standards Act. The law of the State of Maryland, by judicial pronouncement of its own courts before the enactment of Chapter 518, characterized the *intrinsic nature* of actions under the Fair Labor Standards Act to be that of specialties. It is this interpretation that should have been accepted by the court below, and having been accepted, there would be no "historic rule" to be rightly amended by the Maryland Legislature. The true intent of the Maryland Legislature to discriminate against this Congressional enactment would then become apparent in all its patent boldness.

Judge Coleman in his opinion attempted to differentiate the case at bar from the *Republic Pictures Corporation* and *Davis* cases (*supra*):

> "That is to say, equal periods of limitations are, in fact, applicable to wage contract rights in Maryland whether they arise under the laws of Maryland or under the Fair Labor Standards Act" (R. 12).

The question that irresistibly arises, if the analysis of the learned District Court below is correct, to wit, that "equal periods of limitations, are, in fact, applicable", is why it was necessary then for the Maryland Legislature to go to the trouble of enacting a special statute solely devoted to expressing the period of limitations to which the Fair Labor Standards Act was subject.

The fact is that there were no equal periods of limitation, for the period applicable to wage contract rights at common law in Maryland and the period applicable to the Fair Labor Standards Act were not the same, the wage rights being governed by a three-year statute, and the statutory rights under the Fair Labor Standards Act being governed by a twelve-year statute.

If the Maryland Legislature had passed a statute providing that all actions based upon a specialty should thenceforth be governed by a three-year statute of limitations, there would and could be no argument as to its constitutionality. But that is not what the Legislature did in this case. What it did here was to select only one type of action heretofore judicially determined to be a specialty, *viz.*, an action under the Fair Labor Standards Act, and remove it to a category governed by a shorter statute of limitations.

In *Kampe* v. *Michael Yundt Co.*, U. S. D. C., Eastern District of Wisconsin, Dec. 10, 1946, 12 Labor Cases 63,500, the court declared to be unconstitutional a Wisconsin Act which attempted to limit to two years causes of action arising under Federal statutes for which no period of limitations had been prescribed. The court in that case said:

> "It is apparent that the Wisconsin Legislature sought to limit a cause of action under the Fair Labor Standards Act to two years, but at the same time continued a six year statute of limitations 'upon any other contract, obligation or liability, express or implied.' Causes of action arising in Wisconsin under Federal statutes are thus singled out for specific and special limitations."

It should be pointed out that Chapter 518, the subject statute involved herein, was enacted by the Maryland Legislature prior to the Congressional enactment of the Portal-to-Portal Act of 1947 which provided a two-year statute of limitations governing the Fair Labor Standards Act. We submit that if the Act of the Maryland Legislature was unconstitutional in 1945, it is unconstitutional today, and its error cannot be cured by subsequent Congressional legislation. It is our claim that the petitioner had a constitutional right to bring his action on June 25, 1946, and the Portal-to-Portal Bill of 1947 in no way retroactively destroyed this right.

B. ***Denial of Equal Protection of the Law.***

Chapter 518 by prescribing a three-year period of limitations for actions arising under the Fair Labor Standards Act clearly violated the Fourteenth Amendment in that it denied the petitioner the equal protection of the law. The petitioner's action asserted under the Fair Labor Standards Act is an action on a statute which creates a new obligation. The law of Maryland provides that citizens of that State bringing actions under statutes creating new or increased obligations are entitled to bring such actions within twelve years. *Taggert Ins. Comm.* v. *Wachter,*

Hoskins & Russel, Inc. (*supra*). Hence, Chapter 518, which limited petitioner and others to three years when asserting rights under the Fair Labor Standards Act, denied them the rights afforded others similarly situated.

The District Court had an astounding answer to this, and gave the phrase "similarly situated" a remarkable definition. "Under the Maryland statute," said the learned court, "all persons to whom a right of action accrues under the Fair Labor Standards Act in Maryland have precisely the same rights" (R. 15). In other words, even if Chapter 518 provided a one-month statute of limitations, according to Judge Coleman, there would be no denial of equal protection of the law, for all claiming under that Act would have one month, and none of them less than one month. But of course this is not the test. Being similarly situated under like conditions does not mean being identically situated under identical conditions, a distinction that the court below failed to make.

At any rate, said Judge Coleman, there is requisite parity between the petitioner whose wages are controlled by the Federal Labor Standards Act and "all other wage earners in Maryland as respects their rights to sue for wages accrued under ordinary wage contracts" (R. 15). But this is not so, for the law of Maryland clearly distinguishes between actions arising under the Federal Labor Standards Act and other statutes, and actions based on ordinary wage contracts, providing a twelve-year and a three-year provision of limitations, respectively. The nine-year difference conclusively establishes disparity, and results in the denial of petitioner's rights under the "equal protection" clause of the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, the application for writ of certiorari should be granted.

Respectfully submitted,

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